



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**MISC CIVIL APPLICATION NO. 140 OF 2018**

**EFRAIM YOSSEF.....APPLICANT**

**VERSUS**

**ROSEMARY W. KIHU.....RESPONDENT**

**RULING**

1. The Application for determination is dated 28/05/2018. It seeks the following substantive prayer:

***“THAT this honourable court be pleased to enlarge time and grant the applicant leave to file an appeal out of time against the Judgment/Decree dated 31<sup>st</sup> January, 2018 in respect of Nakuru CMCC No. 1775 of 2005: Efraim Yossef Vs Rosemary W. Kihiu.”***

2. The Application is supported by the Affidavit of Nasimiyu G. Wekesa, Advocate.

3. The Application is opposed. The Respondent have filed a Replying Affidavit by Mark Ng’ang’a Githiru in opposition.

4. The uncontested facts can be easily stated: The Applicant was the Plaintiff in the Lower Court. After trial, the Learned Trial Magistrate set the judgment date for 20/12/2017. On that day, the judgment was not delivered with the Learned Trial Magistrate indicating that the judgment will be delivered on notice.

5. The judgment was eventually delivered on 31/01/2008. It would appear that neither parties were present when it was delivered. In any event, it is not contested that the Applicant did not have notice of the judgment date. It is unclear how the Learned Trial Judgment ended up delivering the judgment without notice to the parties and in the absence of both.

6. The Respondent’s advocate depones that in exercise of due diligence he went to the Trial Court to inquire about the judgment on 14/02/2018, and thereby learnt that the judgment had been delivered on 31/01/2008. The Advocate says that he wrote a letter to the Applicant’s advocates on the same day informing them about the judgment and requesting for a tabulation of the costs as they had been awarded to the Plaintiff. The Applicant’s advocates deny receiving the letter. The letter attached to the Respondent’s advocate’s affidavit does not bear the stamp of the Applicant’s advocates to show that it was in fact sent or received.

7. Applicant’s advocates insist that the first time they knew of the judgment was on 21/03/2018 when they received a letter from the Respondent’s advocates informing them of the same. The Advocate depones that she personally went to the registry to make inquiries but was informed that the Court file

was missing and could not be traced.

8. It is important to point out though the Respondent's advocate admits to receiving a copy of the judgment on 14/02/2018, he did not include it in the letter sent to the Applicant's advocates.

9. Meanwhile, hampered by failure to trace the Court file, the Applicant's advocate wrote an official letter to the Chief Magistrate to raise a complaint. That letter is dated 18/04/2018. The Respondent's advocates concede receiving it.

10. Meanwhile, on 23/03/2018, the Respondent's advocates arranged to pay the full "decretal" amount to the Applicant's advocates vide RTGS transfer. The Advocate depones that they were actuated by the fact that the Respondent had a 30-day stay of execution which had expired.

11. Eventually, the Applicant's advocate says they received a copy of the judgment when Mr. Githiru, advocate for the Respondent informally gave it to Mr. Musangi of the Applicant's advocates' law firm. By then it was too late to file an appeal but it enabled them to draft a Memorandum of Appeal and make the present application. The advocate depones that she has been unable to trace the Lower Court file to date.

12. The Respondent argues that the Applicant was simply not diligent to discover the judgment and prefer an appeal if dissatisfied. The time lapsed, they argue, is unreasonable since the Applicant's advocates had knowledge of delivery of the judgment. Allowing the application, further argues the Respondent, "would amount to substantial injustice, drag the matter longer in an unmerited appeal that would be obviously dismissed only increasing litigation costs for all parties involved."

13. Finally, the Respondent insists that the Application is futile since there can be no appeal over a judgment which has been fully settled.

14. Section 79G of the Civil Procedure Act is the operative part in answering the question whether the prayer to enlarge time to file the appeal is merited. The section provides as follows:

*Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:*

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.

15. Our decisional law has now provided guidelines on what constitutes "good cause" for purposes of permitting a party who is aggrieved by a Lower Court judgment or ruling to file an appeal out of time. The most important consideration is for the Court to advert its mind to the fact that the power to grant leave extending the period of filing an appeal out of the statutory period is discretionary and must be granted on a case by case basis. While not a right, it must be exercised judiciously and only after a party seeking the exercise of the discretion places before the Court sufficient material to persuade the Court that the discretion should be exercised on its behalf and in their favour.

16. Our case law has developed a number of factors which aid our Courts in exercising the discretion whether to extend time to file an appeal out of time. Some of these factors were suggested by the Court of Appeal in *Mwangi v Kenya Airways Ltd [2003] KLR*. They include the following:

- a. The period of delay;
- b. The reason for the delay;
- c. The arguability of the appeal;

- d. The degree of prejudice which could be suffered by the Respondent if the extension is granted;
- e. The importance of compliance with time limits to the particular litigation or issue; and
- f. The effect if any on the administration of justice or public interest if any is involved.

17. I will now consider the Applicants' application for extension of time against these factors.

18. The Respondent complains that the Applicant was not diligent in discovering that judgment had been given; and then, even with knowledge of the judgment, they took too long to file an appeal or an application for extension of time. Further, the Respondent is convinced that once a party has paid out the decretal amount, the judgment is settled and there can be no appeal against the judgment.

19. Of course there is no rule of law that stipulates that once the decretal amount is paid the need for an appeal is legally obviated. Indeed, the legal principles are the opposite: stay of execution is only granted in exceptional circumstances and where an appeal would otherwise be rendered nugatory if execution proceeds.

20. Looking at all the other factors in totality, I am unable to agree with the Respondent that this Application is an abuse of the Court's process and should not be allowed. I am also unable to agree with the Respondent that his advocate was lax and unjustifiably inattentive or that the delay is not excusable. First, it is important to point out that parties are not expected to "discover" judgment dates. Administration of justice is not a hide-and-seek game where parties are kept in the dark about important dates on their matters and it is up to them to mine the information in the registries and elsewhere. It would be unfair to blame a party for not "discovering" a judgment that was delivered without notice to the parties.

21. Second, it is not contested that the Lower Court file went missing after delivery of judgment and that the Applicant's advocates were unable to trace it to date. It would be equally unfair to blame the Applicant for the administrative failures of the Court.

22. Third, in the circumstances of the case, I am persuaded that the Applicant's lawyers exercised the level of diligence expected of them. They went to the registry immediately they learnt of the judgment; and they could not trace the file. They kept pressing to find the file. It would have been impossible for them to draft a Memorandum of Appeal without even a copy of the judgment. The parties quibble when Mr. Githiru eventually gave the copy of the judgment to Mr. Musangi – but it is not contested that the copy of the judgment was never officially communicated to the Applicant's lawyers.

23. Fourth, after looking at the Draft Memorandum of Appeal, I am unable to say that the intended appeal is inarguable. At this stage, an Applicant is *not* required to persuade the Appellate court that the intended appeal has a high probability of success. All one is required to demonstrate is the arguability of the appeal: a demonstration that the Intended Appellant has plausible and conceivably persuasive grounds of either facts or law to overturn the original verdict. The Applicant has easily met that standard considering that the Applicant is challenging the assessment of damages in a first appeal where the standard of review is *de novo* review.

24. Fifth, I am unable to see any substantial adverse effects granting this order will have on the Respondent other than permitting the Applicants to exercise a precious right of appeal. Lastly, while the statutory timelines are certainly important to ensure the due and efficient administration of justice, they are not, in themselves, a core substantive value in the same sense, for example, that the Constitution and the Elections Act place on the timelines for filing Elections Petitions.

**25. Consequently, I will allow the appeal. Costs will be in the appeal. The Applicant is directed to file and serve the Memorandum of Appeal within seven days from the date hereof.**

26. Orders accordingly.

**Dated and delivered at Nakuru this 21<sup>st</sup> day of June, 2018**

.....

**(PROF.) J. NGUGI**

**JUDGE**